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COURT OF APPEALS
DIVISION II

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No. 47836-6-II

STATE OF WASHINGTON

COURT OF APPEALS DIVISION II
OF THE STATE OF WASHINGTON

BY CA
DEPUTY

RORY HIGHAM, Appellant

vs.

PIERCE COUNTY, Respondents

REVISED REPLY BRIEF OF APPELLANT RORY HIGHAM

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I. INTRODUCTION / SUMMARY¹

Appellant Rory Higham is seeking on appeal nothing more than appropriate recognition of a County-approved Wetland delineation – which if properly acknowledged, would allow the construction of the Higham family’s planned single family residence. Appellant asks the Court to find that the County wetland delineation remains binding as to both parties (Higham and the County) for at least the following reasons:

- Collateral Estoppel,
- Equity, and
- Application of the County’s own codes.

As the record shows – if collateral estoppel equity and the County’s codes are properly applied, then no variance is required and no review of the variance criteria is needed. Or, alternatively, if the Court finds that none of the above rationales apply, then the appeal should still be granted because the variance criteria are satisfied.

This appeal is NOT an enforcement action. The County Respondent’s brief is replete with allegations of and references to work done without a permit. Those are NOT the subject matter of this appeal. There are no outstanding or on-going enforcement actions.

¹ AR denotes reference to the Administrative Record, on file with the Court. TR denotes reference to the transcript of Examiner's hearing, also on file.

The proper focus of this appeal should be on (1) all those things that Mr Higham the property owner did correctly in pre-obtaining the permits necessary for his Single Family Residence (“SFR”), and (2) taking those pre-existing permits into account, discerning what additional approvals are and **are not** required at this point.

Mr Higham purchased the subject property that contained existing structures and then pursued logical, sequential, and incremental steps toward his ultimate goal: construction of the family’s residence. All the while, the property was used for Agricultural (“AG”) uses, with attendant pasture and farm pond. In 2003-2004, critical first step was taken– preparation of the wetland delineation report, to determine what the existing critical area constraints were.

Mr Higham obtained a County-approved, final wetland delineation, which was recorded against and binding on the property. See **AR 83-86**, Hearing Exhibit 1-L, Wetland approval AFN 200306190272. This wetland delineation contains several significant determinations. The wetland was found to be:

- A Category III type wetland,
- The Buffers was approved as 37.5 feet in width, and
- The AG use was acknowledged, and was not restricted in the buffer area to the south.

The recorded map sets out the only constrained area: “the no-disturb area is as depicted.” (**AR 86**) (copy attached).

The next incremental step occurred in 2004: when Mr Higham sought to straighten out the property’s access. He had good reason. The property contained on SFR on the western portion served by an existing curved access driveway. The existing SFR would be an Accessory Dwelling Unit (“ADU”) upon construction of the new SFR. The existing access is not wide enough for a two-home access, per County code. So, in 2004, Mr Higham applied for and received a Boundary Lot Adjustment (“BLA”) expressly to create the new pipe stem access for the SFR. **TR 23:1-11, 15-25**². That intended driveway use was apparent on the face of the County approved BLA application, and was reviewed and approved by the County. See **AR 88-89** Hearing Exhibit 1-M, BLA AFN 200406115001.

²“to make sure that we could both meet the requirements for providing adequate and suitable , As Mr. Higham has noted, in 2005 there was, a boundary line adjustment. Part of that boundary line adjustment was to establish a new driveway back to that home site location. The existing access to 9 the existing home-site coming into the very southeastern corner is an easement across the neighbor's property....One of the issues that we've run into that is that existing easement comes very, very close to an existing structure. If we are to use that existing easement, enhance it or create a 24-foot wide entry for vehicles for two home-sites, that is going to come very, very close to that existing neighbor's home site. So our idea was to use the road way that was created as a part of the boundary line adjustment. There was not a wetland issue raised in the boundary line adjustment” **TR 23:1-11, 15-25**. Testimony of wetland biologist.

In 2005, Mr Higham proceeded to the next step: water service. In May 2005, the Tacoma Pierce County Health Department received, reviewed and approved Mr Higham's well permit. **AR 100.** The well requires a 100 foot well head protection radius; other than that, the only area depicted as constrained on any of the County-approved plans and permits was the 2003 wetland delineation that restricted use on 37.5 width to the north of the Type III wetland.

2010 was the final step for Mr Higham's plans for the SFR, when he sought the SFR building permit. **AR 32, and 54-56.** Suddenly at the last step, the County's new position was to seek to constrain huge areas of his property. **AR 111.** The buffers areas approved and recorded on his binding wetland delineation had now swollen to a demand for buffers from 75 -100 feet in width. Whole new buffer areas based on alleged wetlands off-site the Higham property sprouted new buffer areas extending on to the Higham site. The effect? The planned Higham home was now in the swollen buffer area, the driveway was overtaken by the off-site wetland buffer area, and even the existing curved driveway wetland was overlaid with a buffer area.

This appeal should be granted for at least one of the following three rationales:

1. Collateral estoppel. Here, the County attempts to change the wetland boundaries and imposed a significantly greater buffer restriction, after it has already pursued a wetland enforcement action – and approved its resolution via an established 37.5 foot wetland buffer recorded against the property. This re-litigation of the County-approved, established wetland buffer is barred by collateral estoppel. The issue of the wetland boundary was fully litigated in 2003, the parties are and remained identical (County and Higham) and the matter was determined with finality (recorded, binding wetland delineation).

2. Equity. No injustice would occur by application of collateral estoppel doctrine. Just the opposite. Both parties should be bound by the determination. Mr Higham did his part, (planting, monitoring, abiding by use restriction); the County- which was solely in control of that delineation process³ - should be equally bound.

3. Application of the County's own Codes. The County's codes call out in numerous places that a final wetland delineation results in permanent constraints. See PCC 18E.10.050, PCC 18E.10.070⁴. If permanent for the property owner – so too should the

³ See PCC 18E.10.070.D.2.a **Review Responsibilities.**

a. **The Department is responsible** for administration, circulation, and review of any applications and approvals required by this Title.

⁴ **PCC 18E.10.070.C.2.a. Title Notification.**

a. When Pierce County determines that activities not exempt from this Title are proposed, the property owner shall file a notice with the Pierce County Auditor. **The notice shall provide a public record of the presence of a critical area and associated buffer, if applicable;** the application of this Title to the property; and that limitations on actions in or affecting such critical area and associated buffer, if applicable, may exist.

PCC 18E.10.070.D. Tracts and other Protective Mechanisms. Prior to final approval of any subdivisions, short subdivisions, large lot divisions, or binding site plans, the part of the critical area and required buffer which is located on the site shall be placed in a separate tract or tracts. (See Figure

County be bound.

PCC 18E.10.070.D.3.b requires that if multiple critical areas, they should all be reviewed concurrently⁵. The Code requires consolidated processing of all related aspects of the County critical area regulations together. In fact, that is what the County did in the Boundary Line Adjustment, where the Pierce County Planning and Land Services Department Preliminary Land Division Checklist – created by the County- found that under the “Critical Areas and Resource Land Review Checklist” for this site all necessary

18E.10-2 in Chapter 18E.120), or alternative protective mechanism such as a protective easement, public or private land trust dedication, **or similarly preserved through an appropriate permanent protective mechanism as determined by Pierce County.**

PCC 18E.10.070.G.1 Markers. The Department may require the outer edge of the critical area boundaries or, if applicable, required buffer boundaries on the site to be flagged by the qualified professional, as outlined in each Chapter. **These boundaries shall then be identified with permanent markers** and located by a licensed surveyor, unless otherwise stated in this Title. The **permanent** markers shall be clearly visible, durable, and **permanently** affixed to the ground.

b. Permanent Fencing. The Department may require the construction of **permanent** fencing along the buffer boundary of a wetland, fish or wildlife habitat conservation area or active landslide hazard area.

3. Signage. a. The Department may require **permanent** signage to be installed at the edge of the critical area or, if applicable, the edge of the required buffer.

b. When a sign is required, it shall indicate the type of critical area and if the area is to remain in a natural condition as **permanent** open space.

⁵ PCC 18E.10.070.D.3. **Review Process.**

a. The Department shall perform a critical area review for any application submitted for a regulated activity, including but not limited to those set forth in Section 18E.20.020.

Reviews for multiple critical areas shall occur concurrently.

b. The Department shall, to the extent reasonable, **consolidate the processing of related aspects of other Pierce County regulatory programs which affect activities in regulated critical areas, such as subdivision or site development, with the approval process established herein so as to provide a timely and coordinated review process.**

applications had been submitted. **Appendix 1.**⁶ The County is estopped from changing its position at this late date.

PCC 18E.10.070.D.3.e calls out the critical areas review is the “parent application” prior to all other permits -- which is exactly the sequence Mr Higham followed here. The ***original wetland delineation in 2003 was created expressly for the proposed home site:***

Anyway, in 2001 we worked with county staff to resolve a suspected violation. And in doing that, we established the location of some on-site wetlands. We established buffers. We put together a planting plan. The planting plan was implemented using a variety of native trees and shrubs. That plan was then reviewed by county staff and accepted. And then subsequent to that, a monitoring plan outlined that the plants had established and were meeting the performance criteria of that mitigation plan. Also, as a part of that mitigation plan, there was a buffer reduction. It went from, at that time, a 50-foot width and buffer down to 37.5 feet. **That was done in preparation for a future homesite back in the northern portion of the site.** We wanted to make sure that we could both meet the requirements for providing adequate and suitable buffer around the wetland areas, **but also providing for a future homesite.**

As Mr. Higham has noted, **in 2005 there was a boundary line adjustment. Part of that boundary line adjustment was to establish a new driveway back to that homesite location.** The existing access

⁶ See true and correct copy of Appendix 1 which was attached to and filed with the County as part of Petitioner's Reconsideration. The Reconsideration is included in the Record on Appeal, but Appendix 1 is missing from the record. See reference at AR 17.

to the existing homesite coming into the very southeastern corner is an easement across the neighbor's property.

TR 22:9-23:11. Mr Higham is not asking for any special treatment.

This appeal should be granted so that both parties to permit process are treated equitably.

II. ANALYSIS IN SUPPORT OF APPEAL.

1. Court Should Not Be Distracted by County's Attempted Red Herring Process Arguments.

A. Appellant adequately preserved all claims of error on appeal, including objection to the Deputy Hearings Examiner's flawed Findings of Fact for the denied variance.

The Appellant adequately preserved all claims of error on appeal, including objection to the Deputy Hearings Examiner's flawed Findings of Fact for the denied variance. Throughout the Opening Brief, Appellant repeatedly called out his objection to the Deputy Hearings Examiner's flawed Findings of Fact for the denied variance, sufficient to preserve the issue for this Court's review. The Deputy's errors regarding the variance denial is the centerpiece issue of this LUPA appeal.

An issue is adequately preserved if that issue is called out in briefing with reasonable clarity. *Wolf v. Columbia Sch. Dist. No. 400*, 86 Wash. App. 772, 776, 938 P.2d 357, 359 (Div. 3, 1997)

(Issue considered because “This court will address the assignment of error because the issue is well framed by the record and briefing.”); *citing Lewis v. Estate of Lewis*, 45 Wash. App. 387, 389, 725 P.2d 644, 646 (Div. 1, 1986) (Review of finding of fact allowed if briefing “clearly indicates that she is challenging the finding” despite not expressly challenging finding pursuant to procedural rule RAP 10.3.); *State v. Olson*, 126 Wash.2d 315, 323, 893 P.2d 629 (1995) (Whether or not a party sets forth assignments of error for each issue on appeal, this court will reach the merits if the issues are reasonably clear from the brief, the opposing party has not been prejudiced and this court has not been overly inconvenienced).

Further, noncompliance the elements of a LUPA petition under RCW 36.70c.070, which include assignment of error, are **not** jurisdictional and do not divest the court of authority to hear argument if the party substantially complies with content requirements. *Keep Watson Cutoff Rural v. Kittitas Cnty.*, 145 Wash. App. 31, 38, 184 P.3d 1278, 1281 (Div. 3, 2008). The primary concern of statutory procedural requirements for special proceedings is that a petitioner timely file and properly serve a party. *Quality Rock Products, Inc. v. Thurston Cnty.*, 126 Wash. App. 250, 268, 108 P.3d 805, 814 (Div. 2, 2005); *citing Citizens to*

Pres. Pioneer Park LLC v. City of Mercer Island, 106 Wash. App. 461, 468, 24 P.3d 1079 (Div 1, 2001). This was done.

Here the variance issue is front and center contested in this LUPA appeal. The LUPA Petition was timely filed and served. The County has been on notice throughout the proceeding that the variance denial is at issue. This Court should decline the County's invitation to sidestep the merits of this appeal by this flawed procedural maneuver.

B. Res judicata Is Proper Issue for This Court to Review.

Before the Superior Court, the County objected to judicial review and application of the doctrine of res judicata/ collateral estoppel. *County Response* to Superior Court at 9:4-8. The County has not raised this issue on appeal, and thus waives it. The County was wrong in any case.

The Appeals Court in *Davidson v. Kitsap Cnty.*, 86 Wash. App. 673, 681, 937 P.2d 1309, 1313 (Div. 1, 1997) rejected a party's contention that the Court should refuse to consider the issue of res judicata because that issue was not raised it before the trial court:

We reject this argument. When we consider on appeal a writ of certiorari⁷, we review the decision of the body that makes the findings and conclusions relevant to the decision. Here, that is the Board of Commissioners. Any failure to raise the

⁷ Writs of certiorari were the precursor to the current LUPA appeal process.

issue before the trial court thus does not preclude appellate review.

Snohomish Cnty. v. Hinds, 61 Wash. App. 371, 375, 810 P.2d 84, 85 (1991) is in accord. Once a superior court has rendered its decision on an administrative appeal, the Court of Appeals reviews that decision “by applying the proper standard of review directly to the record at the administrative proceedings.” *Franz v. Department of Employment Security*, 43 Wash.App. 753, 756, 719 P.2d 597, review denied, 106 Wash.2d 1013 (1986).

**C. County Attempts a “Change Up Pitch” when
Defining the “Issue” which is subject to Res
Judicata Collateral Estoppel.**

The elements of res judicata/collateral estoppel are:

- (1) the issue decided in the prior adjudication is identical with the one presented in the second action;
- (2) the prior adjudication must have ended in a final judgment on the merits;
- (3) the party against whom the plea is asserted was a party or in privity with the party to the prior adjudication; and
- (4) application of the doctrine does not work an injustice.

Shuman v. Dep't of Licensing, 108 Wn. App. 673, 678, 32 P.3d 1011 (2001) citing *Thompson v. Dept. of Licensing*, Wn.2d 783, 982 P.2d 601 (1999). Each of the four criteria is met in this case as to the appropriate wetland buffer width to be applied.

a. The issue of appropriate buffers for the wetland is

identical. The County disputes other collateral estoppel criteria, but does not in its response argue that the issues are not identical. The County thus concedes this point.

The **issue common to all matters** and which is the subject of res judicata is ***the delineation of the wetland and its buffers***. The issue of the wetland and buffer area was County-determined and recorded against the property in 2003. But now, as parts of the pending permit processing, County staff seeks to impose a much greater buffer width from 75-100 feet for this **identical** wetland area. See Staff Report at page 3, AR 40. *Staff's characterization of the Proposal*. This detrimental change sought by the County is barred by collateral estoppel.

It matters not as the County argues, whether the approved wetland area was initially determined as part of a development permit for a house, or garage or a roadway, or anything else. The wetland and buffer area would for all permits be same. Here the actual issue being ***re-litigated*** is the County attempt to change the size of the wetland and buffer area. Collateral estoppel prevents re-litigation after the party estopped has had a full and fair opportunity to present his or her case, **even if second litigation of issues is presented in different claim or cause of action.**

In re Marriage of Mudgett, 704 P.2d 169 Wash.App.Div.1,1985. Collateral estoppel bars re-litigation of particular issue or determinate fact. *State v. Dupard*, 609 P.2d 961 Wash.,1980. Here the particular issue and determinate fact is the size of the wetland and buffer, which was fully litigated and resolved in 2003.

The doctrine of collateral estoppel differs from res judicata in that, instead of preventing a second assertion of the same claim or cause of action, ***it prevents a second litigation of issues between the parties, even though a different claim or cause of action is asserted.*** *Hisle v. Todd Pacific Shipyards Corp.*, 93 P.3d 108 Wash.,2004. When a subsequent action is on a different claim, yet depends on issues which were determined in a prior action, the re-litigation of those issues is barred by collateral estoppel. *City of Arlington v. Central Puget Sound Growth Management Hearings Bd.*, 193 P.3d 1077 Wash.,2008.

Here, the County attempts to change the wetland boundaries and imposed a significantly greater buffer restriction, after it has already pursued a wetland enforcement action – and approved its resolution via an established 37.5 foot wetland buffer recorded against the property. This re-litigation of the County-approved, established wetland buffer is barred by collateral estoppel.

b. A final judgment issued in the prior enforcement action. The County's enforcement action was fully resolved via the Wetland Approval. Resolution is a final judgment. *Shuman v. Dep't of Licensing*, 108 Wn. App. 673, 678, 32 P.3d 1011 (2001). A party need not have a full trial in order to have a full and fair opportunity to present his or her case. *Morris v. McNicol*, 83 Wash.2d 491, 497, 519 P.2d 7 (1974).

c. The parties are identical (Rory Higham and County). The County was the entity that pursued the 2001 land use enforcement action. Rory was the property owner at that time. The parties in the two proceedings are identical. The County dances on the head of a pin with its argument that the parties differ (Higham and PALS (County planning department) in the first case, and Higham and the County Hearing Examiner in the present matter. This is a false distinction with a difference. Pierce County is the entity named in the appeal and the party in both matters.

d. Application of doctrine will not work an injustice. To determine whether application of the doctrine of collateral estoppel would work an injustice, the court must consider whether the parties to the earlier adjudication were afforded a full and fair opportunity to litigate their claim in a neutral forum.

August v. U.S. Bancorp, 190 P.3d 86 Wash.App.Div.3,2008. See also *Satsop Valley Homeowners Ass'n, Inc. v. Northwest Rock, Inc.*, 108 P.3d 1247 Wash.App.Div.2, 2005.

For this reason, it is also completely irrelevant for the County to claim that what differentiates the 2003 wetland determine from the present permit process is that “Off-site wetlands were not addressed at that time.” *County Response*, at 13:6-8. Here, the County was in ***complete and exclusive control*** over the type, quality and ***resolution*** of its enforcement actions. The County chose to pursue the land use enforcement action. The County had full and fair opportunity to prosecute its charge. The County had full control to approve or not the resolution offered by the property owner in 2003. Ultimately the County approved the land use action and recorded the Wetland Approval against the property. That approval sets forth the exact dimensions of the wetland and its required buffer. Further, the property owner was required to establish the wetland boundary as “permanent”. See PCC 18E.10.070.C.2.a. and PCC 18E.10.070.D, and PCC 18E.10.070.G.1.

There is **no injustice** to hold the County accountable for its independent enforcement choices, and the consequence of the resolution action it approves. The real injustice would be to allow

the County essentially a “do-over” despite its pursuit, prosecution and approved resolution of its prior enforcement action. The doctrine of collateral estoppel promotes judicial economy and prevents inconvenience, and even harassment, of parties. *Clark v. Baines*, 84 P.3d 245, Wash.,2004.

The doctrine is especially applicable in the context of land use matters. The Washington Supreme Court has issued strong policies favoring finality in land use decisions and security for landowners proceeding with property development. *Samuel's Furniture, Inc. v. Dep't. of Ecology*, 147 Wn.2d 440, 458, 54 P.3d 1194 (2002); *Chelan County v. Nykreim*, 146 Wn.2d 904, 931, 52 P.3d 1 (2002); *Habitat Watch v. Skagit County*, 155 Wash.2d 397, 120 P.3d 56 (2005), *Asche v. Bloomquist* (2006) 133 P.3d 475.

Leaving land use decisions open to reconsideration long after the decisions are finalized places property owners in a precarious position and undermines the Legislature's intent to provide expedited land use procedures in a consistent, predictable and timely manner. RCW 36.70C.010. *Chelan County v. Nykreim*, 146 Wash.2d 904, 929, 52 P.3d 1 (2002). All elements of collateral estoppel are met.

2. The County/Deputy HE is collaterally estopped from denying access to the site along the BLA established driveway access route.

Each of the four criteria for collateral estoppel is also met with respect to the County's 2004 approval of the BLA. The County/HE is collaterally estopped from denying access to the site along the County approved, BLA established driveway access route. The County splits hairs in its Response by attempting to distance the role the County-approved BLA played in the driveway location. Petitioner never argued that approval of the BLA constituted approval of the driveway **construction** – that is a straw man claim that the County spends its Response brief on.

Instead the County- approved BLA was expressly granted to allow a new 30 foot driveway access for the intended new home location. The BLA in question was **specifically** created for the precise purpose of a driveway access, just as the **original wetland delineation in 2003 was created expressly for the proposed home site, TR 22:9-23:11**, Testimony from Biologist. The County also complexly ignores – because it is an inconvenient fact for them, that although the staff Report alleges that “resource management did not review or approve” the BLA, the Pierce County Planning department did review and issue comments on the BLA application. See **Appendix 1, Pierce County Planning and land Services Department Preliminary**

Land division Review Checklist⁸. That Pierce County

Planning Department checklist was issued for the Higham BLA, and in pertinent part makes the following conclusions:

4. All structures satisfy the required minimum building setback for the zone. The following problems were found: _____”.

No problems are noted on the form, the corresponding Box is marked “OK”.

9. An environmental checklist is required because:

.... ☐ Within a designated Environmental Sensitive Area

No Environmental Sensitive Areas are noted on the form, the corresponding Box is marked “N/A”.

10. Critical Area and resource Land Checklist review, all necessary applications have been submitted. The following discrepancies were found: _____.

No discrepancies are noted on the form, the corresponding Box is marked “N/A”.

Appendix 1 to Opening Brief, *Id.* The information and County’s responses make it clear that the County had full opportunity to review the driveway BLA to determine its conformance with applicable wetland and critical areas and buffers. The County was on clear notice of the BLA’s purpose: to serve as driveway access. See AR 89, **Attached Appendix 1**. Despite this notice to the County and the County’s opportunity to undertake critical area review, the County ***chose*** not to.

⁸ See true and correct copy of Appendix 1 which was attached to and filed with the County as part of Petitioner’s Reconsideration. The Reconsideration is included in the Record on Appeal, but Appendix 1 is missing from the record. See reference at AR 17.

As part of the current permit, County staff seeks to invalidate the very purpose for the BLA, and to now deny driveway access. This detrimental change in the County's position is barred by collateral estoppel. Collateral estoppel prevents re-litigation after the party estopped has had a full and fair opportunity to present his or her case, **even if second litigation of issues is presented in different claim or cause of action.** *In re Marriage of Mudgett*, 704 P.2d 169 Wash.App.Div.1,1985.

b. A final judgment issued in the prior BLA application. The County's review of the driveway access BLA resulted in a final approval. Resolution is a final judgment. *Shuman v. Dep't of Licensing*, 108 Wn. App. 673, 678, 32 P.3d 1011 (2001).

c. The parties are identical (Rory Higham and County). The County was the entity that reviewed and approved the 2003-4 BLA AR 88-89. Rory was the property owner at that time. Here, the County is the approving entity as to both matters. And, the County planning staff did actually comment on the driveway access BLA, which was approved. As part of this Appeal, this Court should have little trouble finding the parties to the BLA action (County and property owner) are precisely the same as the current parties. Res Judicata applies and bars the County's current action

to disavow the BLA.

3. Res judicata applies also to County Health Department Approval of Well Permit – Where Appellant’s House was Depicted.

The County argues it had no notice of the home location. Yet the home site is clearly depicted in the approved Pierce County Health Department well permit. AR 102, attached. Under principles of res judicata, the final outcome is binding upon parties to litigation and **persons in privity** with those parties. *Loveridge v. Fred Meyer, Inc.*, 887 P.2d 898 Wash.,1995. Even nominally different parties may have sufficiently identical interests to satisfy the “identity of parties” inquiry for application of collateral estoppel /rejudicata. *Matter of Pearsall-Stipek*, 136 Wash.2d 255, 961 P.2d 343 Wash.,1998.

4. The County/Deputy HE erred in not granting the Variance, as all Criteria Is Met.

The Court should hold the County to its prior “permanent” designated wetland boundaries. When it does, it becomes clear Petitioner’s variance should be granted. Alternatively, the Court should grant the appeal and remand for approval of the variance based on the Findings of Fact set forth at AR 54-56 under PCC 18E.20.060 which sets forth the criteria to reduce wetland buffers below the standards of PCC 18E.30.060. AR 33.

a. There are special circumstances applicable to the subject property, or to the intended use such as shape, topography, location or surroundings that do not apply generally to other properties or that make it impossible to redesign the project to preclude the need for a variance;

The intrusion of off-site wetlands and buffers onto the subject property is special circumstances applicable to the subject property which does make it impossible to redesign the project to preclude the need for a variance. AR 32, AR 41, Comment 6. Once the limitations of the driveway serving the existing SFR is understood, ***any access*** will require intrusion into an area classified by the County as a critical area buffer. The current variance proposal offers the least impacts.

b. The applicant has avoided impacts and provided mitigation to the maximum practical extent;

Once the boundary of the existing wetland is correctly understood to be 37.5 feet in width, AR 84, the SFR no longer intrudes into the wetland buffer. Once the limitations of the driveway serving the existing SFR is understood, any of the two choices of access will require intrusion into an area classified by the county as a critical area buffer. The current variance proposal offers the least impacts. Findings of Fact at AR 54-56. Thus the Appellant avoided impacts and provided mitigation to the maximum practical extent.

c. The buffer reduction proposed through the variance is limited to that necessary for the preservation and enjoyment of a substantial properly right or use possessed by other similarly situated properties, but which because of special circumstances is denied to the property in question;

The buffer reduction proposed through the pipe stem access variance is limited to that necessary for the preservation and enjoyment of the residential and Agricultural use which is a property right or use possessed by other similarly situated properties. County staff incorrectly offered a “site plan” for which it was claimed that “As clearly shown on the site plan provided, there are other alternatives. The project could redesigned and have no buffer reductions whatsoever” **TR 5:8-11**. The evidence at hearing shows this is **not** true. The staffer’s proposed homesite is located on the only area suitable on the entire site for the required septic.

In order to place a -- a new home site on this parcel and return the existing smaller home into an ADU, we've gone through and had a septic design looked at and submitted for approval. It's presently on hold. **But it basically takes up the best chunk of the property that will drain. That's about the only place -- other than where the existing septic system is for the ADU, that's approximately the only place on the site where that septic system is going to fit.** So in keeping with the prior discussions with the county in 2001, and the desire to keep some pasture out there, we've identified the location of the homesite in the northern portion of the property.

TR 24:20-25:8. Testimony of wetland Biologist. Under the County staffer’s design, the property owner could have a house OR septic in that area but not both. However, since both house and

septic are needed, it is undisputed that the variance is needed and should be grant to allow buffer reduction or intrusion so that both house and septic can be located on site.

Once the boundary of the existing wetland is correctly understood to be 37.5 feet in width, the SFR no longer intrudes into the wetland buffer. Once the limitations of the easement driveway serving the existing SFR is understood, use of either of the two accesses will require intrusion into an area classified by the county as a critical area buffer. Appellant's offered pipe stem access variance proposal offers the least impacts. Thus the Appellant has avoided impacts and provided mitigation to the maximum practical extent.

d. Granting the variance will not be materially detrimental to the public welfare or injurious to the property or improvement.

The Staff Report admits that the proposal to build a new single family home and retain the existing mobile home as an ADU **is consistent with the local zoning and land use of the area. It poses no direct hazard to either the site or surrounding properties, such as flooding or erosion. AR 44, Finding 4.**

It meets the requirements of other codes (e.g., fire prevention, building) to ensure that the proposed

improvement will not be at risk as a result of the buffer reduction. Id. However, Staff stated that reducing a wetland buffer ***is expected*** to have a negative impact on the functions of the wetlands. Id. No facts in the record establish any ***actual*** negative impact. The testimony of Appellant's wetland biologist establishes just the opposite:

As identified by the county, there's not going to be a direct impact to wetlands or streams. We've avoided those impacts. We believe we've minimized those impacts by much of the prior work that was done in establishing wetland and buffer areas on-site, the very western portion of the site, the western property boundary, is going to be fenced. So that fence will isolate on-site activities from adjacent wetland areas to the west. And so that we do not really expect this homesite to result in a negative impact to the functions of adjacent or on-site wetlands and adjacent wetlands and buffers.

TR 25:9-21, Testimony of wetland biologist. Further, once the boundary of the existing wetland is correctly understood to be 37.5 feet in width, the SFR no longer intrudes into the wetland buffer. Once the limitations of the easement access serving the existing SFR is understood, either of the two accesses will require intrusion into an area classified by the county as a critical area buffer. Thus Appellant has avoided impacts and provided mitigation to the maximum practical extent. The current pipe-stem access variance proposal offers the least impacts, and it should be granted.

This Court should find that when the correct reading of the

facts as applied to the applicable law, Appellant's variance criteria is met to allow minimal intrusion to a wetland buffer for the pipe stem access driveway.

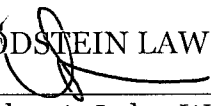
III. CONCLUSION

This Court should grant this appeal and remand for a new Decision:

- (1) collaterally estopping the County from ignoring its prior approvals: (a) AR 83-86 Hearing Exhibit 1-L, Wetland approval AFN 200306190272, which establishes the proper wetland buffers at 37.5 feet and (b) AR 88-89 Hearing Exhibit 1-M, BLA AFN 200406115001, which expressly created Appellant's preferred pipe-stem residential driveway access, or alternatively,
- (2) granting the requested variance, because all criteria are met.

Appellant also requests reasonable attorney fees and costs and any other relief the Court deems just and reasonable under the circumstances.

RESPECTFULLY SUBMITTED this 1st day of March 2016.

GOODSTEIN LAW GROUP PLLC
By: 
Carolyn A. Lake, WSBA #13980
Attorneys for Appellant Higham



200306190272 4 PGS
06-19-2003 01:04pm \$22.00
PIERCE COUNTY, WASHINGTON

Return to:
Mr. Rory Higham
2501 Chesney Road East
Tacoma, WA 98445

PIERCE COUNTY PLANNING AND LAND SERVICES
WETLAND AND/OR WETLAND BUFFER NOTICE

Grantor*: Rory Higham, Property Owner(s)

Grantee*: Rory Higham, Property Owner(s)

*The terms grantor and grantee are for indexing purposes only.

Property Address: 2501 Chesney Road East

Assessor's property tax parcel number(s): 0319142008

Legal description (abbreviated: i.e., lot, block, subdivision name/number or quarter/quarter section, township, range):

Quarter of Section 14, Township 19 North, Range 3 East, W.M.

Size of wetland and buffer areas (in square feet) located on the property: (Note: Do not include off-site wetland or buffer areas.)

Category:

On-Site Wetland Area:

On-Site Buffer Area:

Total wetland and buffer area on site:

Wetland A

III

30,737

9,675

40,412

NOTICE: This property contains wetlands or wetland buffers as defined by Chapter 18E, Pierce County Code. Restrictions on use or alteration of the site may exist due to natural conditions of the property and resulting regulations.

6-18-03

Date

Signature of Property Owner

Attachments 2: Wetland Approval

Plat map or final binding site plan depicting the wetland and buffer areas (showing the delineation and calculated areas of any divisions of land and all wetland and wetland buffer areas, if applicable.)

NOTARY:

STATE OF WASHINGTON)

COUNTY OF PIERCE) ss

On this 19th day of June

2003

before me, the undersigned, a Notary Public in and for the State of Washington, duly commissioned and sworn, personally appeared Rory Higham to me known to be the individual described in and who executed the foregoing instrument, and acknowledged to me that he/she/they signed and sealed the said instrument as a free and voluntary act and deed for the uses and purposes therein mentioned.

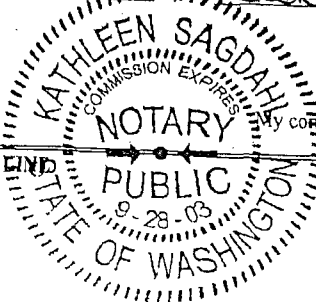
Given under my hand and official seal this

19th

day of

June

2003



Notary Public in and for the State of Washington

Residing at

My commission expires

9/28/03

AFFIX SEAL OR STAMP ABOVE THIS LINE
2higham.doc

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CONDITIONS OF WETLAND APPROVAL
FOR
WETLAND APPLICATION NO. 332935

Project Description: Higham Homesite

Parcel No.: 0319142008

Site Address: 2501 Chesney Road East

Date of Issuance: June 19, 2003

Date All Construction Must Be Completed: Within 3 years of date of issuance

The following conditions are based upon the site visits conducted by Pierce County Planning and Land Services Department staff, the wetland application, and the document entitled: "Higham Homesite," dated February 26, 2002, prepared by Thomas Deming of Habitat Technologies.

These conditions apply to the on-site wetland and buffer. The wetland has been categorized as a Category III wetland. **A 37.5-foot wetland buffer is being allowed. This reduction has been allowed with the required restoration.**

The south half of the "pond" may continue to be used for agricultural purposes. However, please keep in mind that sensitivity of the natural half of the pond must be considered. The pastured upland portion, not designated as wetland area, of the property may also continue to be used as pasture. The wetland regulations with regard to existing agriculture apply.

A minimum of 3 years of monitoring for the restoration from the date of issuance of the approval.

The aeration structure proposed for the pond must be located on the south half of the pond that is being allowed for agricultural use.

This wetland approval contains conditions placed on the site to allow for restoration that addresses correction of a violation. This wetland approval is being accepted for correction of the violation and to document existing structures and activities on site that were either approved or were pre-existing. **A new wetland review will be required for any change of use associated with any new proposed development activities or structures on the site.** If none of the correction/restoration activities occurs on the site in three years, the wetland approval will expire and the parcel may again be subject to compliance/correction.

The issuance of this wetland approval does not constitute approval of other proposed projects by the landowner. The applicant must comply with all other applicable requirements of Pierce County Departments and other state and federal agencies with jurisdiction. Further development on this site may require additional environmental and wetland review.

Please be advised that Pierce County Planning and Land Services may suspend or revoke this approval if the applicant has not complied with any or all of the conditions or limitations set forth in the approval; has exceeded the scope of work set forth in the approval; or, has failed to undertake the project in the manner set forth in the approved application. In addition, the Department is charged with the enforcement of the wetland regulation, and is authorized to issue violation notices and administrative orders, levy fines, and/or institute legal actions in court.

WETLAND CONDITIONS:

1. The following activities are regulated within a wetland, stream, and/or their buffers unless exempted by Section 18E.20.030 or as allowed pursuant to an approved mitigation plan:
 - a. Removing, excavating, disturbing, or dredging soil, sand, gravel, minerals, organic matter, or materials of any kind;
 - b. Dumping, discharging or filling;
 - c. Draining, flooding or disturbing the water level or water table. In addition, an activity which involves intentional draining, flooding or disturbing the water level or water table in a wetland or stream, in which the activity itself occurs outside the regulated area, shall be considered a regulated activity;

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For reference only, not for re-sale.

- d. Driving piling or placing obstructions, including placement of utility lines;
 - e. Constructing, reconstructing, demolishing, or altering the size of any structure or infrastructure;
 - f. Altering the character of a regulated area by destroying or altering vegetation through clearing, harvesting, cutting, intentional burning, shading, or planting;
 - g. Activities which result in significant changes in water temperature or physical or chemical characteristics of wetland or stream water sources, including changes in quantity of water and pollutant levels;
 - h. Application of pesticides, fertilizers and/or other chemicals, unless demonstrated not to be harmful to the regulated area; and
 - i. The division or redivision of land.
2. All wetland and buffer areas currently existing on the site shall remain as undisturbed areas. There shall be no grading, clearing, or other kind of vegetation removal, filling, or construction of any kind within the undisturbed wetland and buffer areas.
 3. A minimum building setback line of eight feet shall be established from the edge of the wetland buffer.
 4. Storing or stockpiling of materials or soil is not allowed in the wetland or its buffer. All stockpiled soils shall be stabilized or protected to prevent soil loss.
 5. All construction vehicles' fueling and staging areas shall be located outside of the wetland and buffer.
 6. Burning of land clearing slash and other materials in the wetland or its buffer is prohibited.
 7. Construction materials, land clearing debris, lawn clippings, and other garden debris shall not be placed in the wetland or its buffer.
 8. Due to the sensitive nature of the wetland, application of pesticides, fertilizers, and/or other chemicals in the wetland and/or buffer is prohibited.
 9. All appliances, tires, and other non-organic trash shall be removed from the wetland and its buffer. Items shall be disposed of at an approved solid waste handling facility.
 10. All exotic, invasive, or undesirable vegetation, and all weeds listed on the State Noxious Weed List may be removed from the wetland and buffer by clipping, hand pulling, hand digging, or by an alternative plan, upon approval of Pierce County Planning and Land Services.
 11. All down and dead woody material, including logs and fallen branches, shall be left in the wetland and its buffer to provide structure, habitat, and nutrients to the wetland system.
 12. All snags (dead trees) and perch trees (trees with broken tops or limbs) shall be left in the wetland and its buffer, as they provide an important wildlife habitat component to the buffer and wetland. Danger trees shall only be cut or removed with the permission of Pierce County Planning and Land Services.

Reviewed and Approved by:

Sheila Wynn 6/19/03
Sheila Wynn, Environmental Biologist

SW:jg
2higham.doc

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PIERCE COUNTY RECORD OF SURVEY
FOR BOUNDARY LINE ADJUSTMENT
OF THE NW 1/4 OF SECTION 14, TOWNSHIP 19 NORTH,
RANGE 3 EAST OF THE WILLAMETTE MERIDIAN.

BASIS OF BEARING:
MAGNETIC NOS. 2004 & 2005
FIELD EQUIPMENT:
STAMPED IS 8003
KNOWN TOPIC TOTAL STATION
POS. ADJ. = 1:20,000 +/- 0.06 ft.
METHOD:
FIELD TRAVERSE

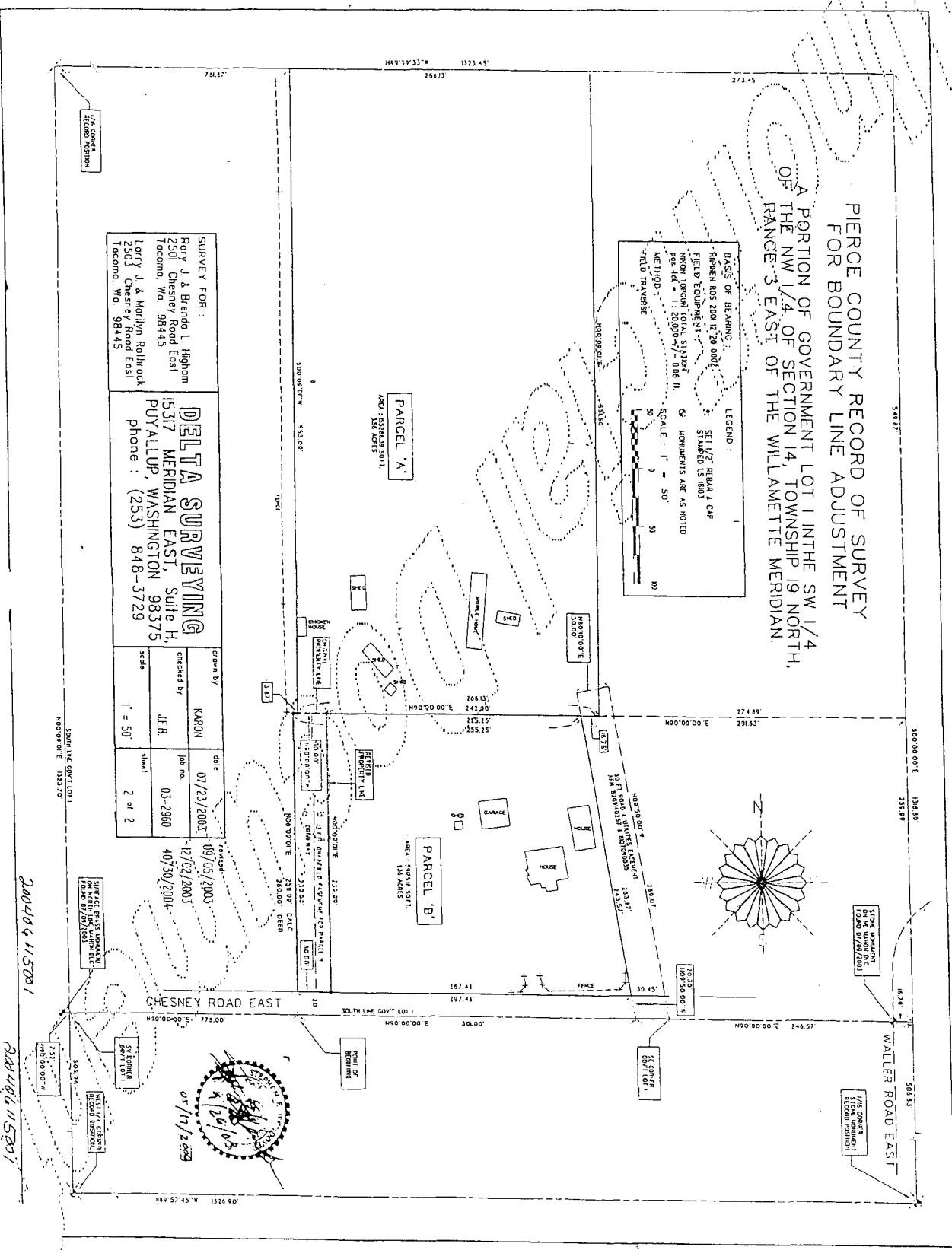
LEGEND:
SET 1/2" REBAR 1 CAP
STAMPED IS 8003
6" MONUMENTS ARE AS NOTED
SCALE: 1" = 50'
50' 0 50' 100'

SURVEY FOR:
Rory J. & Brenda L. Higham
2501 Chesney Road East
Tacoma, Wa. 98445
LARRY J. & MERILYN ROHRACK
2503 Chesney Road East
Tacoma, Wa. 98445

DELTA SURVEYING
15317 MERIDIAN EAST, Suite H,
PUYALLUP, WASHINGTON 98375
phone: (253) 848-3729

Drawn by	KARON	date	07/23/2003
Checked by	J.E.B.	job no.	03-2960
Scale	1" = 50'	Sheet	2 of 2

06/05/2003
12/02/2003
40/30/2004



ORIGINAL

315278

88

area to be enhanced
with native trees and shrubs

0 scale in feet 200
100

existing large
cottonwood tree

*future
phone
site*

*interior
west side
100' x 100'*

*Nature
Pond*

AG Pond

existing invasive
shrubs to be
removed from
planting area

WATER
AERATION
FEATURE

NOT FROM
SURVEY

existing large
Douglas fir tree

PROPERTY
BOUNDARY
(fenced)

existing
internal
road

fence line ditch

*PAD
832-3400
206-832-3402*

photo point=

No Disturbance
Area

existing home

existing
barns

existing
excavated
pond

*highlighted
area for
irrigation*

HIGHAM FAMILY HOMESITE
2501 CHESNEY ROAD EAST

existing
access

existing
homesite

RECEIVED
MAY 17 2005

Tacoma-Pierce County
Health Department

CHESNEY ROAD EAST

HABITAT
TECHNOLOGIES

REVISED
FEBRUARY 2002



PRELIMINARY LAND DIVISION REVIEW CHECKLIST

Applicant: Myt Benda-Holmes
 Address: 2301 Chesnut Rd E
Tacoma 98445

Surveyor: Delta Surveyors
15317 Marillian E
Puyallup 98375

Date Filed: October 9, 2003
 Date Reviewed: January 10, 2003

Reviewer: John Hill

- ☐ Short Subdivision
- ☐ Large Lot Division
- ☐ Amendment
- ☒ Boundary Line Adjustment
- ☐ Other

Parcel Number: 0319142008
2019

Location: Section 14, Township 19 N, Range 03 E. Application Number: 375278

NA	OK	CORRECTIONS REQUIRED
<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/> 1. The Assessor Treasurer's comments have been forwarded to surveyor and owner.
<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/> 2. All required items of information are present. The following information items must be completed: _____
<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/> 3. The existing zoning is correctly shown. The correct zoning is: _____
<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/> 4. All structures satisfy required minimum building setbacks for the zone. The following problems were found: _____
<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/> 5. Complete and accurate lot dimensions have been provided and all of the proposed lots satisfy the minimum width, area, and density requirements of the zone. The following problems were found: _____
<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/> 6. All structures and uses conform to the allowed uses within this zone. The following problems were found: _____
<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/> 7. The free consent statement appearing on the plat drawing is correct. See Standard Note # ____ on the back of this form.
<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/> 8. The surveyor's Certificate is stamped, signed, and current (not more than 90 days).
<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/> 9. An environmental checklist is required because: <ul style="list-style-type: none"> <input type="checkbox"/> Property in proposed short plat is part of short plat or formal subdivision previously exempted from SEPA. <input type="checkbox"/> Within a designated Environmentally Sensitive Area. <input type="checkbox"/> Within a Natural Shoreline Environment. <input type="checkbox"/> Large Lot Division. <input type="checkbox"/> Other _____
<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/> 10. Critical Area and Resource Land checklist review, all necessary applications have been submitted. The following discrepancies were found: _____
<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/> 11. The proposal complies with all related short plats, large lots, formal plats, boundary line adjustments and required associated notes and easements. The following discrepancies were found: _____

<<SEE ASSESSORS-TREASURERS REVIEW CHECKLIST ATTACHED>>

Other Comments: Remove Parcel "B" designation of amendment. Re-number Parcel "C" to "B" for project clarification.

PRELIMINARY LAND DIVISION REVIEW CHECKLIST

Applicant: Walt Brinkley
Address: 2321 Chesney Rd E
Tacoma 98445Surveyor: John Hill
15317 Maryland E
Puyallup 98375Date Filed: October 9, 2003Date Reviewed: November 10, 2003Reviewer: John Hill

- ☐ Short Subdivision
☐ Large Lot Division
☐ Amendment
☒ Boundary Line Adjustment
☐ Other

Parcel Number: 0319142008
2019Location: Section 14, Township 19 N, Range 03 E.Application Number: 375278

NA OK

CORRECTIONS REQUIRED

- | | | | |
|-------------------------------------|-------------------------------------|-------------------------------------|--|
| <input type="checkbox"/> | <input checked="" type="checkbox"/> | <input type="checkbox"/> | 1. The Assessor Treasurer's comments have been forwarded to surveyor and owner. |
| <input type="checkbox"/> | <input checked="" type="checkbox"/> | <input type="checkbox"/> | 2. All required items of information are present. The following information items must be completed: _____ |
| <input checked="" type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | 3. The existing zoning is correctly shown. The correct zoning is: _____ |
| <input type="checkbox"/> | <input checked="" type="checkbox"/> | <input type="checkbox"/> | 4. All structures satisfy required minimum building setbacks for the zone. The following problems were found: _____ |
| <input type="checkbox"/> | <input type="checkbox"/> | <input checked="" type="checkbox"/> | 5. Complete and accurate lot dimensions have been provided and all of the proposed lots satisfy the minimum width, area, and density requirements of the zone. The following problems were found: _____ |
| <input type="checkbox"/> | <input checked="" type="checkbox"/> | <input type="checkbox"/> | 6. All structures and uses conform to the allowed uses within this zone. The following problems were found: _____ |
| <input type="checkbox"/> | <input checked="" type="checkbox"/> | <input type="checkbox"/> | 7. The free consent statement appearing on the plat drawing is correct. See Standard Note # ____ on the back of this form. |
| <input type="checkbox"/> | <input checked="" type="checkbox"/> | <input type="checkbox"/> | 8. The surveyor's Certificate is stamped, signed, and current (not more than 90 days). |
| <input checked="" type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | 9. An environmental checklist is required because: <ul style="list-style-type: none"> <input type="checkbox"/> Property in proposed short plat is part of short plat or formal subdivision previously exempted from SEPA. <input type="checkbox"/> Within a designated Environmentally Sensitive Area. <input type="checkbox"/> Within a Natural Shoreline Environment. <input type="checkbox"/> Large Lot Division. <input type="checkbox"/> Other _____ |
| <input checked="" type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | 10. Critical Area and Resource Land checklist review, all necessary applications have been submitted. The following discrepancies were found: _____ |
| <input type="checkbox"/> | <input checked="" type="checkbox"/> | <input type="checkbox"/> | 11. The proposal complies with all related short plats, large lots, formal plats, boundary line adjustments and required associated notes and easements. The following discrepancies were found: _____ |

<<SEE ASSESSORS-TREASURERS REVIEW CHECKLIST ATTACHED>>

Other Comments:

Amend Parcel B" description of easement. Renumber
 Parcel C" to "B" for project clarification.



REQUIRED FINDINGS

FOR YOUR APPLICATION TO BE APPROVED, THE FOLLOWING CRITERIA MUST BE MET BY YOUR PROPOSAL

WETLAND BUFFER OR CRITICAL FISH AND WILDLIFE HABITAT BUFFER VARIANCE

PLEASE ADDRESS EACH CRITERIA AND SUBMIT WITH THE MASTER APPLICATION

The Hearing Examiner shall have the authority to grant a variance from the requirements of Sections 18E.30.060 and 18E.40.060 when, in the opinion of the Examiner, all of the following criteria have been met:

- A. That there are special circumstances applicable to the subject property or to the intended use such as shape, topography, location, or surroundings that do not apply generally to surrounding properties or that make it impossible to redesign the project to preclude the need for a variance;

As outlined in "WETLAND, STREAM, AND WILDLIFE HABITATS ASSESSMENT STUDY FOR THE DEVELOPMENT OF A SINGLE-FAMILY HOMESITE" dated May 11, 2007 and as revised following discussions with Pierce County Environmental Staff the project site exhibited a Pierce County Type N2 Water along the northern boundary of the site and a Category 2 Wetland within the eastern portion of the site. A potential Category 2 Wetland was also located offsite to the west. Prior land use actions completed during 2001 and 2002 had defined the buffer areas associated with the onsite stream and wetland areas. These actions had included the restoration of the buffer plant community adjacent these critical areas and the placement of protective fencing approved by Pierce County Environmental Staff.

The location of onsite and offsite wetlands, the onsite stream, and associated buffers significantly limits potential locations for the placement of a single-family homesite, septic system, driveway, and well site outside of the standard buffer areas and consistent with other properties within the local area. In addition, the high water table within the parcel further limits the location of the placement of the septic system. The homesite location and the utilization of the existing access driveway connection to Chesney Road East which was created as a part of an approved boundary line adjustment creates the unavoidable encroachment into the standard buffer for a potential wetland area located offsite to the west. There is no other location for the access driveway along the western portion of the project site and this driveway provides a feasible connection to a public roadway. The present access to the southeastern corner of the project site does not appear supported by easement agreements and its utilization would require significant modification to onsite and offsite properties.

The selected locations for the new single-family homesite, the well, and the septic system avoids potential significant adverse impacts to the identified critical areas and the associated buffer.

Based on the character, shape, and location of the onsite and offsite wetlands and the onsite stream it is impossible redesign the project in a manner suitable to both utilize the project site for the development of a single-family homesite and to preclude the need for a variance to continue utilization of the existing driveway through the buffer of a potential wetland.

As discussed with the project team it is not possible to locate the new homesite within the southeastern corner of the project site because of flood zone issues.

- B. That the applicant has avoided impacts and provided mitigation to the maximum practical extent:

The selected development action focuses on establishing a single-family homesite within the northwestern portion of the project site. The creation of this homesite, as proposed, along with the associated septic system, private well, and access would NOT require the adverse impact to the identified onsite or offsite wetlands or stream areas. The area selected for the new homesite is best defined as "upland" and has been impacted by prior land use actions (i.e. pasture management).

Site development shall also implement Best Management Practices to avoid potential adverse impacts to the established buffer and defined wetlands and stream. The outer boundary of the established buffer has been clearly defined and posted to further protect these critical areas.

- C. That the buffer reduction proposed through the variance is limited to that necessary for the preservation and enjoyment of a substantial property right or use possessed by other similarly situation property, but which because of special circumstances is denied to the property in question; and

As defined by existing site characteristics the only suitable location for a new single-family homesite within this existing parcel that would avoid direct impacts to the identified wetlands and stream is within the northwestern portion of the project site. The selected location for this new homesite would not adversely impact identified onsite or offsite critical areas.

However, access to the new homesite along the western boundary of the project site requires the unavoidable impact to the standard buffer associated with the potential offsite Category 2 Wetland. This access provides the only reasonable connection between the new homesite and Chesney Road East. This unavoidable buffer crossing preserves a reasonable utilization of the property while also protecting the short-term and long-term physical and biological functions of the wetland area.

55

Without the ability to cross this buffer within the standards outlined in 18E.30.060, reasonable utilization of the property for a single-family homesite consistent with other properties within the area would not be possible.

- D. That granting the variance will not be materially detrimental to the public welfare or injurious to the property or improvement; and

As presently defined the development of a new single-family homesite within the northwestern portion of the project site would be accomplished without impacting identified wetland and stream resources or adjacent properties. In addition, the new homesite would be consistent with other homesites within the area. As such, the granting of this requested variance would NOT be materially detrimental to the public welfare or injurious to the property or improvement. The development of this homesite would also add to the character of the neighborhood while also preserving critical areas.

Pierce County Hearing Examiner May Impose Conditions on Variances. When granting a variance, the Examiner may attach specific conditions to the variance, which will serve to meet the goals, objectives, and policies of Title 18E. The Examiner has the authority, as part of the approval of the variance, to establish expiration dates or time periods within which the approval must be exercised. Upon expiration, the permit or approval shall be considered null and void. No extensions of the expiration date shall be permitted.

FILED
COURT OF APPEALS
DIVISION II

2016 MAR -1 PM 3:11

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON

RORY HIGHAM

No. 47836-6-II

BY C
DEPUTY

Appellant,

v.

DECLARATION OF SERVICE

PIERCE COUNTY,

Respondent.

The undersigned declares that I am over the age of 18 years, not a party to this action, and competent to be a witness herein. I caused this Declaration and the following document:

1. REVISED REPLY BRIEF OF APPELLANT RORY HIGHAM

was served on March 1, 2016 on the following parties and in the manner indicated below:

Jill Guernsey
Pierce County Prosecuting Attorney/Civil Division
955 Tacoma Avenue South, Ste. 301
Tacoma WA 98402-2160
Email: jguerns@co.pierce.wa.us

☒ [X] by United States First Class Mail

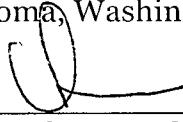
☐ [] by Legal Messenger

☒ [X] by Electronic Mail

☐ [] by Federal Express/Express Mail

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 1ST day of March 2016 Tacoma, Washington.



Carolyn A. Lake

ORIGINAL